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In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF ALASKA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the village council of the Native Village of Tyonek – which is not on or near an Indian reservation – have the authority (1) to prohibit non-members of the village from renting homes in the village, or (2) to prohibit non-Natives from remaining in the village for more than 24 hours?

2. Are the officers of the village council of the Native Village of Tyonek entitled to immunity for acts of discrimination against non-Natives and non-members of the village?

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INTEREST OF THE STATE OF ALASKA

The Attorney General of the State of Alaska files this amicus curiae brief in support of the petition for writ of certiorari filed on behalf of Donald and Erna Puckett and Fred and Virginia Slawson. The State of Alaska has a very definite interest in a case which is about the violation of the fundamental right to live and work where one wishes.

The decisions in the case are of great concern to the State of Alaska. There are more than 200 Native villages in Alaska that are similar to the Native Village of Tyonek. None of those Native villages occupies a reservation. Many of those Native villages have organized under the 1936 Alaska amendments to the Indian Reorganization Act (I.R.A.) or have traditional Native councils in the village. There are a significant number of Natives and non-Natives who live and work in these villages but who are not members of the Native village. The potential for the involuntary displacement of an unknown number of citizens of Alaska now exists because the Ninth Circuit has affirmed the conclusion of the United States District Court for the District of Alaska that the Native Village of Tyonek had the authority to prevent non-members of the village from obtaining housing in that village. Severe adverse consequences could result from attempts by other Native villages to enact and implement similar ordinances.

In addition, the Ninth Circuit decision may have an impact in other states, especially in the western United States. A decision which allows off-reservation but

predominantly Indian communities to exclude non-members is a dangerous precedent, especially if the officials are not accountable for their actions.

This Court should grant the petition for certiorari because the Ninth Circuit's ruling is inconsistent with basic freedoms guaranteed by the United States Constitution and is inconsistent with this Court's previous rulings.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH PREVIOUS RULINGS OF THIS COURT

The United States District Court for the District of Alaska ruled that "officers of an Indian tribe [Tyonek] possess immunity from suit so long as they are acting in their representative capacity and within the scope of the[ir] authority," citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). The district court then concluded that Tyonek had the authority to "exclude non-members of the Village from its 'Family Plan' housing." Therefore, the claims of the Petitioners against tribal officers were "barred by their derivative immunity as officers of an Indian tribe."[1] Appendix B at pages 32-33.

[1] The claims were for both damages and injunctive relief. Appendix B at page 16.

The Ninth Circuit summarily affirmed. Appendix A at page 5.[2] [3]

The Ninth Circuit decisions in *Hardin* and in this case squarely contradict this Court's rulings in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe v. Washington Game Dept*, 433 U.S. 165 (1977).

In *Puyallup Tribe* this Court considered the immunity of a tribe from suit over treaty fishing rights. After acknowledging the sovereign immunity of the Puyallup Tribe, this Court stated:

> Second, whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, does not immunize the individual members of the Tribe.

Puyallup Tribe at 171-172.

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[2] The references are to Appendices A and B of the Petition for Writ of Certiorari filed on October 10, 1989 on behalf of the Pucketts and the Slawsons.

[3] The district court also apparently decided that the Native Village of Tyonek, which was organized under the 1936 Alaska amendments to the Indian Reorganization Act, is a federally recognized Indian tribe because it ruled that Tyonek had sovereign immunity. Appendix B at page 24. Otherwise, Tyonek obviously would not have any claim to sovereign immunity. Yet, the Alaska amendments were specifically set up to organize groups other than tribes and is therefore not conclusive of tribal status. *Native Village of Stevens v. AMP*, 757 P. 2d 32 (Alaska 1988); *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988); *Contra Native Village of Noatak v. Hoffman*, 872 F.2d 1384 (9th Cir. 1989) (petition for rehearing pending).

About a year later this Court unequivocally reaffirmed the ruling in *Puyallup Tribe* when it said that "[a]s an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59.[4]

This Court, unlike the Ninth Circuit, has never recognized the Ninth Circuit exception to that rule of law. In this case, the exception would frustrate this Court's recognition of the "propriety of inferring a federal cause of action for the enforcement of civil rights," *Santa Clara Pueblo* at page 61, and would enlarge the scope of a doctrine of questionable vitality. *Puyallup Tribe* at page 178 (Justice Blackmun, concurring).

The Ninth Circuit decision is wrong and should be reversed by this Court.

II. EVEN ASSUMING THAT IMMUNITY EXISTS, UNDER THE FACTS OF THIS CASE THE OFFICERS OF THE NATIVE VILLAGE OF TYONEK ARE NOT ENTITLED TO RELY ON DERIVATIVE IMMUNITY SINCE THE NATIVE VILLAGE OF TYONEK HAS NO AUTHORITY TO ENFORCE THE ORDINANCES AT ISSUE IN THIS CASE

The land upon which the Native Village of Tyonek is located was at one time an executive order reservation.

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[4] Under the tribal membership rules of the pueblo, the offspring of a marriage between a member and a non-member of the tribe are entitled to tribal membership only if the husband/father is a member. In *Santa Clara Pueblo*, a female member of the tribe sued the tribe, alleging discrimination under the Indian Civil Rights Act, 25 U.S.C. § 1302, when the tribe refused tribal membership to her daughter because she (the mother) had married a non-member.

Executive Order 2141 (1915). However, in 1971, that reservation was revoked under §19 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1618. Whether or not Tyonek had the authority to adopt the 'Family Plan' ordinance in 1965, it no longer has the authority to enforce it.[5]

As the Ninth Circuit clearly stated in *State of Alaska v. Native Village of Venetie:*

> The merits of this action concern whether appellants have jurisdiction to tax appellees' business activities in Native Village. The power to tax "is an inherent and essential part of the authority of any government. The power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority." F. Cohen, *Handbook on Federal Indian Law* 431 (1982) (footnote omitted). A tribe exercises its sovereign governmental authority within its tribal territory. The governing legal term for tribal territory is "Indian country." *Id.* at 27. Thus, it follows that a tribal tax is only valid within the confines of Indian country.

856 F.2d at 1390

The prohibition against the rental of a home obviously must operate in a particular place. As with the implementation of the tribal tax, that particular place must be in tribal territory (Indian country). The Native Village of

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[5] The district court ruled that Tyonek had the authority to adopt the 'Family Plan' ordinance because it used money it received under 25 U.S.C. §§398a and 398b to construct the houses at issue in this case. Therefore, the district court concluded it was trust money. Appendix B at pages 34-35. The money may have been held in trust by the United States, but at such time as the United States consulted with Tyonek about its expenditure and Congress appropriated it to Tyonek, it no longer was so. See, e.g., *Hydaburg Cooperative Association v. United States*, 667 F.2d 64 (Court of Claims 1981).

Tyonek does not occupy Indian Country. The land upon which the village is located is owned in fee simple by the village and regional for-profit corporations established under §7 and §8 of ANCSA, 43 U.S.C. §§1606-1607, and ANCSA corporation lands are not Indian country. 43 U.S.C. §§ 1601 and 1618. *See Native Village of Stevens v. AMP*, 757 P.2d at 41. As such, Tyonek's authority is *at best* severely limited and certainly does not extend to non-members, especially under the circumstances in this case. To say that Tyonek, being outside of Indian country, may still effectively evict people from the village is flat wrong.[6]

Even if for the sake of argument it is assumed that Tyonek is located on some type of Indian country other than a reservation, it still lacks the authority it asserts in this case. The authority of a village council in off-reservation Indian country is far less than when a reservation is involved. Such limitations have consistently been recognized.

On reservations, the presumption is that tribal governments have exclusive jurisdiction except where Congress has not prohibited state regulation and such regulation does not interfere with tribal government. *See* F. Cohen, *Handbook of Federal Indian Law* Ch. 6 (1982). Outside of reservations, state jurisdiction generally applies to Native people to the same extent as to non-Natives. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,

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[6] It is wrong enough for the Ninth Circuit to uphold Tyonek's authority to "constructively evict" the Slawsons and the Pucketts from the village by prohibiting them from renting a home in the village. However, the district court (and presumably the Ninth Circuit) have yet to decide the validity of a more egregious ordinance that would *actually* require non-Natives to leave the village after 24 hours. That part of the case was remanded to the district court.

148-159 (1973); *Organized Village of Kake v. Egan*, 360 U.S. 60 (1962); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877-878 (D. Alaska 1979).

In general, this Court has linked the concept of Indian sovereignty, and thus governmental powers, to the reservation:

> [The Indian sovereignty] doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. . . . Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. . . .
>
> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[8]

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[8] The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake v. Eagan*, 369 U.S. 60, 62 (1962); Federal Indian Law 846.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171-172 (1973).

In short, the Court will look to specific federal statutes or treaties granting tribal authority or limiting state authority, and the first place it looks is to any authority setting up a reservation. That theme is echoed again and again in other U.S. Supreme Court cases. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) this Court found federal authority for fish traps in the reservation case (Metlakatla) but found no authority for the traps in the non-reservation villages of Kake and Angoon. The fact that IRA councils existed in those communities provided no basis for exercising authority to sanction fish traps. Likewise, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court held that a specific federal statute barred state taxation of certain off-reservation land leased by a tribe, but there was no bar – in federal statute or Indian sovereignty – to a tax on income derived from the land. The court noted its "repeated statements" that "even on reservations, state law may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." 411 U.S. at 148. In addition, the Court limited the concern for interference with Native self-government to *reservation* self-government:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

411 U.S. at 148-149.

The ruling in *South Naknek*, cited earlier, was based on the same principle: there is no evidence to suggest that

Congress intended that the multitude of small villages across Alaska have reservation-like governmental authority. Indeed, there is great weight of contrary evidence, particularly ANCSA's revocation of reservation status, its declaration against creating permanent racially-defined institutions, and its requirement of intimate state involvement in the affairs of Native villages and Native corporations.[7] Congress simply did not intend that Native villages in Alaska have governmental powers off-reservation.

On a reservation, which the Native Village of Tyonek is not, the authority to regulate non-members is limited. The clearest statement that a reservation government may not regulate activities of non-members unless it is necessary to protect tribal self-government or to control internal relations is in *Montana v. United States*, 450 U.S. 544 (1981), quoting from *United States v. Wheeler*, 435 U.S. 313 (1978):

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the power of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such

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[7] See Sections 2 and 19 of ANCSA, 43 U.S.C. §§1601 and 1618.

> powers as would necessarily be lost by virtue of a tribe's dependent status. *Ibid.* (Emphasis added.)

450 U.S. at 564. The court in *Montana* went on to say:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148; *Williams v. Lee*, 358 U.S. 217, 219-220; *United States v. Kagama*, 118 U.S. 375, 381-382; *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171.

450 U.S. at 564.

This Court's prior analysis provides a concise and clear statement on the limitations of a reservation tribe's powers over non-members even on the reservation. The tribe may not regulate non-members beyond what is *necessary* – not merely expedient or useful – to protect self-government, or *necessary* to control internal relations.

In the situation of the Native Village of Tyonek there is no reservation and no Indian country. Thus, there is simply no authority for that off-reservation Native village to legislate rules of conduct affecting non-members on land not owned by the village.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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